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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

RUSSELL LASH, As Warden of the Indiana State Prison,
Petitioner,

v.

FORREST EUGENE SMITH,

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPENING BRIEF FOR PETITIONER

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v.

FORREST EUGENE SMITH,

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPENING BRIEF FOR PETITIONER

The Petitioner, Russell Lash, as Warden of the Indiana State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 18, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this petition, at p. A-1. A memorandum opinion was rendered by the district Court for the

Northern District of Indiana, South Bend Division, and appears in the Appendix to this petition, at p. A-5.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit was entered on May 18, 1970. A timely petition for rehearing was denied on June 22, 1970. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether any defects in the validity of a guilty plea, voluntarily entered on the prisoner's motion, after refusing the appointment of counsel, in the 1942 proceeding for vehicle taking, were cured by the subsequent assistance of counsel in the 1948 proceeding for recidivism.

2. Whether the prisoner's acts in failing to object to the validity of the 1942 proceeding during the 1948 habitual criminal proceeding and in requesting a dismissal of his petition for writ of certiorari in the Indiana Supreme Court constitute a forfeiture of rights to federal relief.

3. Whether the advice to an accused that, if he cannot afford counsel, counsel would be appointed to represent him was not made applicable to the states until *Miranda v. Arizona*, 384 U.S. 436 (1966) was decided and hence was not required in the 1942 proceedings.

4. Whether established rules of comity and the case of *Evans v. Lane*, 419 F.2d 1337 (7th Cir. 1970), cert. den., U.S., 90 S.Ct. 1858, June 1, 1970, required the Court of Appeals to affirm the order of the district court without prejudice to the prisoner's right to assert a claim for fed-

eral relief only after he had fully exhausted his available state post conviction remedies.

STATEMENT OF THE CASE

Forrest Eugene Smith, respondent, hereafter referred to as the prisoner, is serving a life sentence in the Indiana State Prison at Michigan City pursuant to a conviction for recidivism in 1948. At the time this proceedings was initiated by the prisoner, Ward Lane was the Warden of the Indiana State Prison. Ward Lane has since been succeeded by Russell E. Lash, petitioner here, hereafter referred to as the warden, as Warden of the Indiana Prison.

This proceeding was initiated when the prisoner applied to the District Court for the Northern District of Indiana, South Bend Division, for a writ of habeas corpus under 28 U.S.C. § 2241. The application in issue here was denied by the district court on August 12, 1968, without a hearing. The prisoner's timely petition for a certificate of probable cause pursuant to 28 U.S.C. § 2253 was denied by the district court on August 21, 1968. The prisoner's timely petition to the Court of Appeals for a certificate of probable cause was granted and an appeal ensued. The decision of the Court of Appeals provides the grist for this petition.

In 1942, the prisoner was charged with vehicle taking in the Vigo Circuit Court, State of Indiana. The prisoner, without the assistance of counsel, pleaded guilty. He was sentenced to the Indiana Reformatory for a period of not less than one (1) year nor more than ten (10) years.

The prisoner subsequently obtained his release only to be convicted again of vehicle taking in 1945 and 1948. In addition to vehicle taking, the prisoner was also tried and convicted as a recidivist in 1948.

In the habeas corpus proceedings in the district court, the prisoner challenged the validity of his conviction as a recidivist on the ground that he had been denied his Sixth Amendment right to counsel in the 1942 proceeding in that he had not been advised by the Vigo Circuit Court that if he could not afford to retain counsel, the court would appoint counsel to represent him.

The prisoner pleaded guilty to a charge of vehicle taking in the Vigo Circuit Court in 1942. The record was entered in a narritive form. The record shows, in part:

> "... and now the said defendant asks leave to enter his plea of guilty during vacation, and the court grants same, and now the said defendant is arraigned, and the said affidavit was read to him by the prosecuting attorney, and before he entered his plea he was advised by the State of Indiana the nature of the crime charged and penalties thereof, and if he wanted an attorney to represent him [in] this cause, and the said defendant stated that he did not want the service of an attorney and that he knew the nature of the crime and penalty thereof, and that he wanted to plead guilty to the charge of vehicle taking as charged in the affidavit...."

It is interesting to note that in its written opinion, the Court of Appeals ommitted that portion of the record in which the prisoner asks the leave of the Vigo Circuit Court to enter his plea of guilty during vacation.

The Court of Appeals reversed the decision of the district court denying habeas corpus relief without a hearing. The Court of Appeals concluded that the prisoner's right to counsel required the trial court to advise the prisoner that the court would appoint counsel if the prisoner could not afford to retain private counsel and that since the record of the proceedings in the Vigo Circuit Court did not af-

firmatively show that the prisoner had been advised by the court that if he could not afford counsel, counsel would be appointed to represent him, an evidentiary hearing must be held in the district court to determine whether the prisoner had been properly advised of his right to counsel and whether he had intelligently and understandingly waived his right to counsel.

The record in this proceeding affirmatively shows that the prisoner was represented by counsel, N. George Nasser, in the 1948 proceedings for vehicle taking and for recidivism.

Bearing on the relief question, the facts show that the prisoner's claim has never been reviewed on the merits by the Indiana Supreme Court. The fault lies with the prisoner. Proceeding under former rules 2-40 and 2-40A of the Supreme Court of Indiana, the prisoner filed a petition requesting permission to file a belated motion for a new trial in the Vigo Circuit Court in 1964. When this was overruled, the prisoner correctly petitioned the Indiana Supreme Court for a writ of certiorari to review the judgment of the Vigo Circuit Court under the then prevailing rules. However, in the spring of 1965, while the prisoner's petition was pending before the Indiana Supreme Court, the prisoner was paroled. While on parole the prisoner petitioned the Indiana Supreme Court to dismiss his petition for a writ of certiorari. On February 21, 1966, the Indiana Supreme Court the prisoner's petition and dismissed the cause. See *Smith v. State*, 247 Ind. 191, 114 N.E.2d 179 (1966), appearing at p. A-7 of the Appendix. When the prisoner's parole was revoked subsequently, he sought to reinstate his petition for a writ of certiorari in the Indiana Supreme Court. Referring to its earlier opinion in a note, the Indiana Supreme

Court *dismissed* the prisoner's petition to reinstate his petition for a writ of certiorari on July 2, 1968. See Appendix p. A-8.

This cause was argued before the Court of Appeals on May 19, 1969. The Court of Appeals entered its written decision on May 18, 1970. While this cause was pending before the Court of Appeals, two significant events occurred. On August 1, 1969, new Indiana Post Conviction rules entitled Rule P.C. 1 and Rule P.C. 2, Indiana Rules of Procedure, inaugurating sweeping post conviction relief, became effective. Secondly, the case of *Evans v. Lane*, 419 F.2d 1337 (7th Cir. 1970), cert. den., U.S., 90 S.Ct. 1858, June 1, 1970, holding that an applicant for federal habeas relief must exhaust his state court remedies under Rule P.C.1 and Rule P.C. 2 under established rules of equity, even though the new rules had become effective while the appeal was pending, was decided on January 7, 1970.

REASONS FOR GRANTING THE WRIT

I

THE DEFECTS, IF ANY, WHICH WERE FOUND BY THE COURT OF APPEALS IN THE VALIDITY OF THE PRISONER'S VOLUNTARY GUILTY PLEA ENTERED IN THE 1942 PROCEEDING FOR VEHICLE TAKING WERE CURED BY THE SUBSEQUENT ASSISTANCE OF COUNSEL IN THE 1948 RECIDIVIST PROCEEDING.

Let it be said at the outset that this argument assumes that the prisoner's constitutional right to counsel in the 1942 proceeding included the advice that if he could not afford to retain private counsel, the court would appoint counsel to represent him. This is a point which the warden

does not concede but must be assumed for the sake of the argument made in this section.

In 1942 the prisoner was charged with vehicle taking in the Vigo Circuit Court. The prisoner pleaded guilty, was convicted and sent to the Indiana Reformatory to serve his sentence. The record of that proceeding, appearing only in a narrative form, shows that:

> ". . . and now the said defendant asks leave to enter his plea of guilty during vacation, and the court grants same, and now the said defendant is arraigned, and the said affidavit was read to him by the prosecuting attorney, and before he entered his plea he was advised by the State of Indiana the nature of the crime charged and penalties thereof, and if he wanted an attorney to represent him [in] this cause, and the said defendant stated that he did not want the service of an attorney and that he knew the nature of the crime and penalty thereof, and that he wanted to plead guilty to the charge of vehicle taking as charged in the affidavit. . . ."

The prisoner contended, and the Court of Appeals so held, that the prisoner's right to counsel in the 1942 proceeding included a requirement that the trial court advise the prisoner that the court would appoint counsel if the prisoner could not afford to retain his own. Furthermore, because the record of the proceeding in the Vigo Circuit Court did not affirmatively show that the prisoner had been advised that if he could not afford to retain private counsel the court would appoint counsel to represent him, the Court of Appeals ordered that a hearing be held in the district court to determine whether the prisoner's 1942 conviction was void.

The prisoner can only be regarded as challenging the voluntariness of his guilty plea. The prisoner's conviction

is void only if the guilty plea is void. A guilty plea is a judicial confession of guilt. It is void only if involuntarily made. Certainly the prisoner's guilty plea was not entered involuntarily in a literal sense. The record shows that the prisoner asked the leave of the Vigo Circuit Court to enter his guilty plea during vacation. The record further shows that the prisoner said, in response to the questions of the court, that he did not want the service of an attorney, that he knew the nature of the crime, its penalty and that he wanted to plead guilty to the charge of vehicle taking as charged in the affidavit. Consequently, the prisoner's plea of guilty can be regarded as involuntary only if not made intelligently. In turn, the prisoners' guilty plea can be regarded as not have been intelligently made only if it could be said that the prisoners guilty plea was not made with the full knowledge of all facts which it was the courts duty to make known to him (in this case that the court would appoint counsel for him if he could not afford to retain private counsel).

That the voluntariness of his guilty plea is the core of the prisoner's complaint becomes plain when the circumstances of his case are viewed from another perspective. The prisoner claims a denial of his constitutional right to counsel. However, constitutional rights are not violated in the abstract. Some adverse consequence must flow from an alleged denial before one's right to challenge it becomes operative in the courts. Examples in the area of criminal law abound. For instance, an accused's conviction is not automatically void just because he was improperly advised of his rights under *Miranda v. Arizona*, 384 U.S. [illegible], so long as his conviction is not based on his oral or written statements or based on evidence obtained as the result of his oral or written statements. Similarly, an accused's conviction is not automatically void just

because evidence was obtained as a result of an unlawful search and seizure under *Mapp v. Ohio*, 367 U.S. 643 (1961), so long as the evidence unlawfully seized does not serve as a basis for obtaining a conviction or obtaining other evidence which in turn brings about a conviction.

In summary, the prisoner challenges his 1942 conviction. That conviction however was based on a plea of guilty, a judicial confession. To void the conviction, the guilty plea must be voided. The guilty plea was the prisoner's. Thus the prisoner must be regarded as challenging the voluntariness of the guilty plea he entered to the charge in the 1942 proceeding in the Vigo Circuit Court.

This brings us to the crux of the warden's argument in this section. If the voluntariness of the prisoner's guilty plea is in issue, then the recent case of *Parker v. North Carolina*, U.S., 90 S.Ct. 1458 (1970) controls. The prisoner never sought an appeal of his 1942 conviction. For at least two periods prior to his conviction for recidivism in 1948, the prisoner was at liberty during which he might have sought redress. Significantly, the record in this case affirmatively shows that the prisoner was represented by counsel, N. George Nasser, in the 1948 proceedings for vehicle taking and recidivism.

It was not until 1964 that the prisoner first challenged his 1942 conviction, claiming a denial of his Sixth Amendment right to counsel, some twenty-two (22) years after he pleaded guilty without the assistance of counsel and some sixteen (16) years after he was convicted for recidivism with the assistance of counsel.

The prisoner does not claim that he was an indigent and entitled to court appointed counsel in the 1942 proceeding. The prisoner does not claim that his guilty plea was physically or phychologically coerced. The prisoner does

not even request an opportunity to plead over. The prisoner claims that merely because he was not advised of his right to counsel according to present day standards, the conviction is void and he is entitled to release.

Applying this Court's decision in *Parker v. North Carolina, supra*, to this cause requires that the decision and judgment of the Court of Appeals be reversed. Parker was a 15 year old Negro boy who was arrested late in the evening of July 16, 1964, for the crimes of burglary and rape. Under somewhat attenuated circumstances, Parker formally confessed to burglary and rape the next morning. Within a short period of time Parker had an attorney. A month later Parker pleaded guilty.

In seeking federal habeas corpus relief, Parker challenged the voluntariness of his guilty plea alleging that the plea was the product of a coerced confession obtained in violation of his constitutional rights. Parker claimed that, but for the confession obtained in violation of his constitutional rights, he would not have pleaded guilty. The claim was identical to that made by the prisoner. The prisoner in this case must be regarded as claiming that but for the denial of his constitutional right to counsel he would not have pleaded guilty. This Court rejected Parker's pleas. The prisoner's pleas in this case merit no more. This Court reviewed the record regarding the voluntariness of Parker's plea but went on to hold that the subsequent assistance of counsel cured any defects regarding the admissibility or validity of Parker's confession. This Court said:

> ". . . *but we need not evaluate the voluntariness of petitioner's confession* since even if the confession should have been found involuntary, we cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such

> enduring effect as to make involuntary a plea of guilty entered over a month later. Parker soon had food and water, the lack of counsel was immediately remedied, and there was ample opportunity to consider the significance of the allege promises. After the allegedly coercive interrogation, there were no threats, misrepresentations, promises, or other improper acts by the State. Parker had the advise of retained counsel and of his family for the month before he pleaded. The connection, if any, between Parker's confession and his plea of guilty had 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 267-268, 84 L.Ed. 307 (1939); Wong Sun v. United State, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441 (1963). As far as this record reveals, the guilty plea was Parker's free and voluntary act, the product of his own choice, just as he affirmed it was when the plea was entered in open court." (Emphasis added). 90 S.Ct., at p. 1462.

This Court's reasoning in *Parker* applies with equal force to this case. The result reached in this case must be the same. Whatever the merits of the prisoner's alleged deprivation of his right to counsel in 1942, the prisoner was fully represented by counsel in the 1948 habitual criminal proceeding. Under the reasoning of *Parker*, any defects in the 1942 proceeding were fully cured in the 1948 recidivist proceeding when the prisoner was fully represented by counsel whose competency is not challenged, nor could it be. See *Parker* at p. 1462 and *McMann v. Richardson*, U.S., 90 S.Ct. 1441, 1448 (1970) for the proposition that all the advice of prisoner's counsel in the 1948 recidivist proceeding need not ". . . withstand retrospective examination in a post-conviction hearing. . . ." Implicit in this Court's decisions in the companion cases of *Parker v. North Carolina, supra, McMann v. Richardon, supra,* and *Brady v. United States*, U.S., 90 S.Ct. 1463 (1970), is

an attitude that guilty pleas merit a degree of finality absent some legitimate claim affecting the voluntariness and integrity of the plea itself, particularly where the conviction was "valid under the constitutional standards applicable at the time. . . ." *McMann v. Richardson*, at p. 1450.

In conclusion the prisoner does not raise a challenge to the integrity of the 1942 plea itself. The prisoner was fully represented by counsel in the 1948 proceeding, the time to legitimately challenge the 1942 conviction. The prisoner did not challenge the 1942 proceeding for the first time until twenty-two (22) years later. The 1942 and 1948 conviction were valid under constitutional standards applicable at the times. Thus, the judgment and decision of the Court of Appeals should be reversed by this Court.

II

THE PRISONER'S ACTS IN FAILING TO OBJECT TO THE VALIDITY OF THE 1942 PROCEEDINGS DURING THE 1948 HABITUAL CRIMINAL PROCEEDING AND IN REQUESTING A DISMISSAL OF HIS PETETION FOR WRIT OF CERTIORARI IN THE INDIANA SUPREME COURT CONSTITUTE A FORFEITURE OF THE PRISONER'S RIGHT TO FEDERAL HABEAS CORPUS RELIEF.

The prisoner claims he was denied his constitutional right to counsel in the 1942 proceeding. However, the prisoner has long since been released from custody, constructive or otherwise, on the conviction obtained as a result of that proceeding. In 1948, the prisoner was charged with recidivism. In order to sustain a conviction under

the Indiana Habitual Criminal Act, the State must prove that the defendant has been convicted of three felonies. In this case, one of the three felonies supporting the prisoner's conviction for habitual criminality was the 1942 conviction of which he now complains. The prisoner is now in custody as a result of the 1948 conviction as a recidivist. Thus, the prisoner must show that the 1948 conviction as a habitual criminal is infirm. To do this he challenges the 1942 proceeding as was done in *Burgett v. Texas*, 389 U.S. 109 (1967). This case however, differs significantly from the facts and circumstances leading up to this Court's decision in *Burgett*. In *Burgett*, the defendant timely objected to the introduction of the record of a prior conviction into evidence for the reason that it was constitutionally infirm. In this case, the prisoner made no such objection, nor does he claim to have made an objection to the introduction of the record of the 1942 conviction into evidence during the 1948 proceeding in which he was convicted for recidivism.

The prisoner's failure to posit an objection contemporaneous with the introduction of his prior record during 1948 proceeding would under state law constitute a bar to review of his conviction. As this Court said in *Henry v. Mississippi*, 379 U.S. 443 (1965), a state has a legitimate interest in a contemporaneous objection rule. Had the prisoner pursued relief on direct appeal in the state courts, the Indiana Contemporaneous Objection Rule would have barred relief. Similarly, the prisoner would have been denied relief in the federal courts under the doctrine of independent and adequate state grounds. *Henry v. Mississippi, supra; Fay v. Noia*, 371 U.S. 391 (1963). See also *Parker v. North Carolina, supra; Cardinale v. Louisiana*, 394 U.S. 437 (1969).

When the warden raised the question of the applicability of *Gideon v. Wainright*, 372 U.S. 335 (1963), to the 1948 recidivist proceeding, the Court of Appeals said that:

> "Respondent argues that petitioner waived his claim that the 1942 conviction was invalid by failing to raise the point when it was used against him in 1948. This argument must fail if for no other reason then that *Gideon* had not yet been decided." Appendix p. A-4.

The effect of the decision of the Court of Appeals in this respect, was to make retrospectivity a one way street for the benefit of defendants only. In other words, the prisoner could claim the benefits of *Gideon*, but the State could not. The decision of the Court of Appeals in this respect is novel, incorrect and contrary to ruling precedents of this Court.

Retrospective operation is grounded in the common law and may be regarded as the general rule. Prospective application is the exception. It is ordinarily invoked on the basis of policy considerations. See 10 A.L.R.3d 1371, for retrospective operation generally. In the leading case of *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court said:

> ". . . we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice upon the subject.' " 381 U.S., at p. 629.

Thus, the constitution does not prohibit applying *Gideon* to prisoner's 1948 recidivist proceedings.

In *Linkletter*, this Court discussed the Blackstonian and Austinian views. Under the Blackstonian approach, new law was discovered, not created. An overruled decision, being a false statement of the law, was never actually the law. On the other hand, under the Austinian view, the

law was discovered and intermediate cases decided under a overruled decision were not disturbed. In *Linkletter*, implicitly relying upon the Austinian view, this Court refused to apply *Mapp v. Ohio* 367 U.S. 643 (1961), retrospectively, and hence prior cases were not disturbed. In contrast, it is clear from this Court's decision in *Linkletter, supra*, that in applying *Gideon, supra*, retrospectively, the court was adverting to the Blackstonian view. The Austinian view precludes a retrospective application in that decisions intervening between the overruled and the overruling decisions are not disturbed. On the other hand, under the Blackstonian view, the overruling decision was treated as though it had always been the law an intervening decision were subject to re-review. Applying *Gideon* retrospectively, *Gideon* was just as assuredly the law in 1948 as it was in 1942. That *Gideon* had not been decided in 1948 is immaterial under the Blackstonian view and hence did not justify the refusal of the Court of Appeals to apply *Gideon* to the 1948 proceeding.

In the same vein as the prisoner's procedural default, was the prisoner's request to the Indiana Supreme Court to dismiss a petition for Writ of Certiorari. In 1964, the prisoner initiated proceedings in the state courts to challenge the validity of the 1942 proceedings as a support for his conviction in 1948 as a recidivist. Under the then prevailing rules, the prisoner initiated an action in the court of conviction, the Vigo Circuit Court. Upon a denial of relief in that court, the prisoner properly sought relief in the Indiana Supreme Court on a petition for a Writ of Certiorari to review the decision of the Vigo Circuit Court denying relief. However, while his petition for certiorari was pending in the Indiana Supreme Court and before it had been decided by the Indiana Supreme Court, the prisoner was paroled and sought its dismissal. Thus,

at the request of the prisoner, the Indiana Supreme Court dismissed his petition for certiorari. See *Smith v. State*, 247 Ind. 191, 214 N.E.2d 179 (1966), for the courts opinion. See Appendix, p. A-7. When the prisoner's parole was subsequently revoked, he sought to reinstate his petition for certiorari in the Indiana Supreme Court. Referring to its earlier opinion in a note, the Indiana Supreme Court *dismissed* the prisoner's petition to reinstate his petition for a Writ of Certiorari on July 2, 1968. See Appendix p. A-8. Indiana's jurisprudence makes no provision for a petition to reinstate a petition for a Writ of Certiorari previously dismissed at the request of the prisoner. The Indiana Supreme Court's dismissal constitutes a recognition that a petition to reinstate does not lie.

The prisoner's acts in this case constitute a deliberate by-pass of state procedures and remedies. Under the doctrines espoused by this Court in *Henry v. Mississippi*, *supra*, and *Fay v. Noia*, *supra*, the prisoner, in deliberately by-passing the state procedures and remedies, has forfeited all rights to habeas corpus relief on the issue on which he sought relief, and upon which he prevailed, in the Court of Appeals. See also *Wardai v. Hayden*, 387 U.S. 294, (1967).

The acts of the prisoner constituting a deliberate by-pass were (1) his request to dismiss his petition for writ of certiorari before the Indiana Supreme Court, a collateral proceeding in which the prisoner could have obtained relief and (2) the prisoner's failure to take an appeal from his conviction for recidivism in 1948. That the prisoner deliberately by-passed a state remedy when he requested the Indiana Supreme Court to dismiss the petition for a writ of certiorari pending before it is quite clear. Less obvious, is the question of how the prisoner's failure to take an appeal from his 1948 conviction for

recidivism constitutes a deliberate by-pass. Under state law, if the prisoner had appealed his 1948 recidivist conviction, claiming a denial of the right to counsel in the 1942 proceeding, he would have been procedually defaulted for his failure to pose an objection to the introduction of the record of the 1942 proceeding during the 1948 recidivist proceeding. The issue posed is whether the act of one who is convicted of a crime, in avoiding a remedy, which if pursued would result in a procedural default barring federal relief, constitutes a deliberate by-pass also barring federal relief, even though the procedural default was never actually incurred. Involved is the relationship between the doctrine of independent and adequate state grounds and the doctrine of deliberate by-pass. This is an important issue which is unresolved by this Court. The future relationship of the federal courts with the state courts in criminal matters is at stake.

The warden's position is that the prisoner's failure to pursue a remedy (in this case a direct appeal from the 1948 recidivist conviction) which would have resulted in a procedural default constitutes a deliberate by-pass barring federal habeas corpus relief, even though the prisoner never incurred the procedural default. Any other rule seriously dilutes the effect and finality of judgment of the state courts. For instance, if a procedural default on direct review can serve to foreclose a consideration of a federal claim in a federal court, on review or in the collateral proceeding, then a defendant's interest would best be served by avoiding direct review in either state or the federal courts. Under these circumstances, would not a defendant be better advised to reserve his federal claims for collateral proceedings? But does not the law prefer that all matters be resolved on direct review, when possible? Further, does not the law prefer that state criminal matters

be resolved in the state courts rather than the federal courts?

The judgment of the Court of Appeals ignores these considerations. The Court of Appeals has put in question the validity of a conviction which is almost thirty (30) years old. The Court of Appeals has granted relief to the prisoner on a claim which the prisoner has never put to the state courts. Is there no finality in a conviction? Are the judgments of the state courts to be given so little affect? The warden submits that the judgment of the Court of Appeals should be reversed.

III

THE PRISONER WAS NOT ENTITLED TO BE ADVISED BY THE VIGO CIRCUIT COURT IN THE 1942 PROCEEDING THAT IF HE COULD NOT AFFORD COUNSEL, COUNSEL WOULD BE APPOINTED TO REPRESENT HIM BECAUSE THIS IS A REQUIREMENT MADE APPLICABLE TO THE STATES BY *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), WHICH DOES NOT APPLY TO CASES TRIED PRIOR TO JUNE 13, 1936.

The prisoner argued in the Court of Appeals that if he had not been advised by the Vigo Circuit Court that if he could not afford to retain private counsel, the court would appoint counsel to represent him, he had been denied his right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. The Court of Appeals adopted prisoner's argument as its decision in this case. The warden submits that in so doing, the Court of Appeals erred. Its decision should be reversed.

The specific advice to which the prisoner claims he had a right in the 1942 proceedings was formulated and first

made applicable to the states in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). Unquestionably, the prisoner had a Sixth Amendment right to counsel under the teachings of *Gideon v. Wainright*, 372 U.S. 335 (1963), which attached to the 1942 proceedings. However, an accused's right to counsel in the state courts in 1942 did not include the specific advice claimed by the prisoner in this case, prior to this Court's decision in *Miranda v. Arizona, supra*. It was in *Miranda* that an accused's right to counsel was crystalized to include the specific advice to which the prisoner adverts. However, the requirements of *Miranda, supra*, are not applicable to cases tried prior to June 13, 1966. *Johnson v. New Jersey*, 384 U.S. 719 (1966). Since the prisoner was tried prior to June 13, 1966, the Vigo Circuit Court was not required to advise the prisoner that the court would appoint pauper counsel to represent the prisoner if he could not afford to retain private counsel to represent him in the 1942 proceeding. See, *Morrissey v. Scafati*, 272 F.Supp. 762 (D.C., Mass 1967); *Commonwealth v. Morrissey*, 351 Mass. 505, 222 N.E.2d 755 (1967) (same case).

IV

ESTABLISHED RULES OF COMITY AND THE CASE OF *EVANS V. LANE*, 419 F.2d 1337 (7th Cir. 1970), CERT. DEN., U.S., 90 S.Ct. 1858, JUNE 1, 1970, REQUIRED THE COURT OF APPEALS TO AFFIRM THE ORDER OF THE DISTRICT COURT WITHOUT PREJUDICE TO THE PRISONER'S RIGHT TO ASSERT A CLAIM FOR FEDERAL RELIEF AFTER HE HAD FULLY EXHAUSTED HIS AVAILABLE POST CONVICTION REMEDIES.

Even if the Court of Appeals correctly found that the prisoner's constitutional right to counsel had been violated

in the 1942 proceedings, the Court of Appeals erred in remanding this cause to the district court for a hearing on the question of waiver.

The prisoner has a state post conviction remedy available to him which he has not yet exhausted. This cause was argued on May 19, 1969. On August 1, 1969, the new Indiana Post Conviction Rules, Rule P.C. 1 and Rule P.C. 2, Indiana Rules of Procedure, became effective. The Court of Appeals entered its opinion and judgment in this cause on May 18, 1970. The warden's first opportunity in which to bring this issue to the attention of the court below was on its petition for rehearing. This the warden did. The warden's petition for rehearing was denied.

If the Court of Appeals has correctly required an evidentiary hearing on the question of his alleged denial to the right to counsel in the 1942 proceeding, then, if at all possible, the proper place to have such a hearing is in the state court. See *Haury v. Mississippi*, *supra*; *Case v. Nebraska*, 381 U.S. 336 (1965); *Evans v. Lane*, *supra*; *Peters v. Rutledge* 397 F.2d 731 (5th Cir. 1968); *Milton v. Wainwright*, 396 F.2d 214 (5th Cir. 1968); *Petition of Barry*, 388 F.2d 592 (3rd Cir. 1965); *Worley v. Swenson*, 386 F.2d 186 (8th Cir. 1967); *Baines v. Swenson*, 384 F.2d 621 (8th Cir. 1967).

Under Rule P.C. 1, Indiana Rules of Procedure, the prisoner can obtain a hearing on his right to counsel claim ". . . at any time . . ." Rule P.C. 1 also provides that the Public Defender must serve as counsel at such a hearing. That the Indiana courts fully implement the Sixth Amendment's guarantee of a right to counsel, see the case of *Fitzgerald v. State*, __ Ind. __, 257 N.E.2d 305 (1970).

The Court of Appeals in refusing to affirm the order of the district court without prejudice to the prisoner's right to assert a claim for federal relief after he had pursued his state remedies under Rule P.C. 1 has displayed an unwillingness to follow its decision in *Evans v. Lane, supra*. The facts here are identical to the facts in *Evans*. In both cases, the new Indiana Post Conviction Rules became effective after the district court had denied relief but before the Court of Appeals had entered its judgment. The opinion and judgment of the Court of Appeals in the cause represents a split from its decision in *Evans v. Lane, supra*, which must be resolved by this Court.

Thus, the decision of the Court of Appeals in this cause runs contrary to the rules of comity and represents a split from other decisions of the same circuit. Thus, even if the Court of Appeals was correct in its opinion and judgment that the prisoner was improperly denied his right to counsel, its decision and judgment still must be reversed.

CONCLUSION

This case presents important questions regarding the federal-state relationship, the affect to be given state court judgments and the finality to be accorded state court judgments in criminal matters. For the foregoing reasons, this Court should grant this petition to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Repsectfully submitted,

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Attorney General of Indiana
WILLIAM F. THOMPSON
Assistant Attorney General
Attorneys for Petitioner

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 APRIL SESSION, 1969

Nos. 17208, 17209.

FORREST EUGENE SMITH,
Petitioner-Appellant,
v.
WARD LANE, Warden, etc.,
Respondent-Appellee.

Appeal from the United States District Court, for Northern Indiana, South Bend Division.

May 18, 1970

Before KILEY and FAIRCHILD, *Circuit Judges*, and WISE, *District Judge*.[1]

FAIRCHILD, *Circuit Judge*. Petitioner Smith is imprisoned under a life sentence imposed in 1948 by an Indiana court. He was then convicted of theft of a vehicle, and the sentence imposed for the specific offense has expired. He was also sentenced to life imprisonment under Indiana's

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[1] District Judge Wise of the Eastern District of Illinois is sitting by designation.

habitual criminal statute[2] by reason of the fact that before the 1948 conviction he had twice (in 1942 and 1945) been convicted of felony.

In February, 1968, Smith filed a petition in federal district court for habeas corpus. The petition was denied February 13, 1968 partly on the ground that Smith had failed to exhaust state remedies. After further proceedings in Indiana courts, he filed another petition. The latter was denied August 12, 1968. Smith appealed from both denials. Only the second need be considered.

Smith alleged that the 1942 conviction on his plea of guilty was invalid because he had been denied his right to counsel. He set forth a record entry in narrative form. The district court, without a hearing, concluded that the entry showed a sufficient waiver of counsel.

The entry was quoted as follows:

> ". . . the said affidavit was read to him by the prosecuting attorney, and before he entered his plea he was advised by the State of Indiana the nature of the crime charged and the penalties thereof, and if he wanted an attorney to represent him in this cause, and the said defendant stated that he did not want the service of an attorney, and that he knew the nature of the crime and the penalty thereof, and that he wanted to plead guilty to the charge of Vehicle Taking as charged in the affidavit. . . ."

At best for the state, the record fails to show that petitioner was advised that if he was unable to employ an attorney, the court would appoint one who would serve without expense to petitioner.

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[2] Burns, Indiana Statutes, 9-2207,8.

Defendant had a constitutional right to have the assistance of counsel in 1942.[3] It can not be deemed waived if the accused was not informed of his right to counsel even though he can not afford to pay.[4]

Merely asking a defendant if he "wants" an attorney is not sufficient to inform him that he has a right to any attorney.[5]

An indigent accused must know not only of his right to be represented by counsel, but must also know that if he could not procure one through his own resources the court would appoint a lawyer for him.[6]

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[7]

Accordingly we conclude that the district court could not properly determine from the brief record entry quoted in the petition that petitioner had intelligently waived counsel. It became necessary for the court to order respondent to show cause why a writ should not be granted.

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[3] *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 SCt. 792, 9 LEd2d 799, is not limited to prospective application. *Linkletter v. Walker* (1965), 381 U.S. 618, 628, 639.

[4] *Molignaro v. Dutton* (5th Cir., 1967), 373 F2d 729.

[5] See *Lastinger v. United States* (5th Cir., 1966), 356 F2d 14; *Irving v. Breazeale* (5th Cir., 1968), 400 F2d 231; *Jackson v. Maxwell* (D. Idaho, 1966), 262 FSupp. 494. See, however, *Cost v. Boles* (N.D. W. Va., 1967), 272 FSupp. 39.

[6] See *Wright v. Dickson* (9th Cir., 1964), 336 F2d 878, 883; *Townes v. United States* (4th Cir., 1966), 371 F2d 930, 933, cert. den. 387 U.S. 947; *Dodge v. Turner* (D. Utah, 1967), 274 FSupp. 285, 288; *Nielsen v. Turner* (D. Utah, 1968), 287 FSupp. 116, 122.

[7] *Carnly v. Cochran* (1962), 369 U.S. 506, 516, 82 SCt. 884, 8 LEd2d 70.

and to determine any material issues of fact after a hearing.

If petitioner did not intelligently waive counsel in the 1942 proceeding, the 1942 conviction is invalid, and the life sentence which rests upon it is also invalid.[8]

Respondent argues that petitioner waived his claim that the 1942 conviction was invalid by failing to raise the point when it was used against him in 1948. This argument must fail if for no other reason than that *Gideon* had not yet been decided.

The order entered August 12, 1968 is reversed and the cause remanded for further proceedings consistent with this opinion. The appeal from the order entered February 13, 1968 thus becomes moot and is dismissed.

Michael R. Maine of the Indiana bar was appointed to represent petitioner on this appeal. This court is grateful to him for his excellent professional service.

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[8] *Burgett v. Texas* (1967), 389 U.S. 109, 115, 88 SCt. 265, 19 LEd2d 329. See *Losieau v. Sigler* (8th Cir., 1969), 406 F2d 795, cert. den. 38 L.W. 3218; *United States v. La Vallee* (2nd Cir., 1964), 330 F2d 303, cert. den. 377 U.S. 998; *Clark v. Turner* (D. Utah, 1968), 283 FSupp. 909. Contra: *State v. Gurecki* (Ind., 1966), 214 NE2d 392.

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FORREST EUGENE SMITH, #24701 *Petitioner,* v. WARD LANE, Warden of Indiana State Prison, *Respondent.*	Civil No. 4241

ORDER

Petition for leave to proceed in forma pauperis is hereby granted.

Petition for Writ of Habeas Corpus is hereby ordered filed.

Petitioner's allegation that he is being held in custody unlawfully is based on a single ground, *viz.*, that he was not advised of his right to court appointed counsel in the event that he was not able to afford one. This claim refers to a 1942 conviction for vehicle theft entered after a plea of guilty. The relevant facts, excerpted from petitioner's brief, are as follows:

> On August 15, 1942, petitioner entered a plea of guilty to the charge of Vehicle Taking in the Vigo Circuit Court, Terre Haute, Indiana, and was sentenced for a period of one to ten years in the Indiana State Prison. . . . Upon petitioner's arraignment for this charge the 1942 trial court record reads in part: ". . . the said affidavit was read to him (petitioner) by the prosecuting attorney, and before he entered his plea he was advised by the State of Indiana the nature of the crime charged and the penalties therefor, and if he wanted an attorney to represent him in this cause,

> and the said defendant stated that he did not want the service of an attorney and that he knew the nature of the crime and the penalty thereof, and that he wanted to plead guilty . . ."

Petitioner is now serving a life sentence under the Indiana Habitual Criminal Act, being Burns' Ind. Stat. Ann. §§ 9-2207 and 9-2008, as the result of the 1942 conviction complained of, a 1945 conviction, and a 1948 conviction. Petitioner's claim, essentially, is that he is being unlawfully held in custody as an habitual criminal on the basis of three prior convictions, one of which is invalid.

The record is clear that petitioner was advised of the nature of the crime charged, the penalties therefor, and his right to be represented by an attorney. He answered that he did not want an attorney, that he knew the nature of the crime charged and the penalties therefor, and that he desired to plead guilty. Petitioner does not contend that his failure to have counsel, or to be specifically apprised of his right to court appointed counsel, at state expense, tainted, or otherwise affected, the voluntariness of his guilty pleas to the 1942 charge. Nor is petitioner alleging that the 1942 proceeding was unfair. *Quicksall v. Washington*, 339 U.S. 660 (1950).

Because petitioner's averments, taken in the light most favorable to him, do not constitute an allegation that he is being held in custody unlawfully, the Petition for Writ of Habeas Corpus should be and hereby is DENIED.

/s/ ROBERT A. GRANT

DISTRICT JUDGE

ENTER: 12 Aug. 1968.

IN THE

SUPREME COURT OF INDIANA

FOREST EUGENE SMITH,
Petitioner.

v.

STATE OF INDIANA,
Respondent.

No. 0-758

PER CURIAM

The petitioner had filed a petition for permission to file a belated motion for a new trial in the Vigo Circuit Court. Upon the denial of permission to file a belated motion for a new trial, he filed his petition in this court for a writ of certiorari to review the action of the trial court.

He has now by letter informed the court that he has been granted parole and wishes to dismiss his petition for writ of certiorari.

Said petition is now dismissed.

IN THE

SUPREME COURT OF INDIANA

FORREST EUGENE SMTH,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

PS 4

July 2, 1968

Petition to Reinstate Petition for Writ of Certiorari Dismissed. See. 214 N.E.2d 179. Done this 2nd. day of July, 1968. Lewis, J and Hunter, J. Dissent, Mote, J. not participating. Arterburn Acting C. J.